TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 152.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

AUGUSTUS S. WITTEN, AUGUSTUS S. PEERY, AND WILLIAM M. PEERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 4, 1888.

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1 No. 136. THE UNITED STATES *vs.* AUGUSTUS S. WITTEN, AUGUSTUS S. PEERY, and WILLIAM M. PEERY. } Debt on warehouse bond.

Pleas before the hon. judge of the circuit court of the United States for the western district of Virginia, in the fourth circuit, sitting at Abingdon, in the circuit and district aforesaid, on Monday, the 18th day of July, A. D. 1887.

Be it remembered that heretofore, to wit, at rules for the month of July, A. D. 1887, in the clerk's office of the circuit court of the United States for the western district of Virginia, at Abingdon, came the United States, by their attorney for the western district of Virginia, aforesaid, and filed their declaration against Augustus S. Witten, Augustus S. Peery, and William M. Peery, who are citizens of the western district of Virginia, aforesaid, which declaration, with the indorements thereon, is in the words and figures following, to wit:

2 In the circuit court of the United States, for the western district of Virginia, June rules, 1887.

The United States of America, plaintiffs, complain of Augustus S. Witten, Wm. M. Peery, and Augustus S. Peery, defendants, who have been duly summoned, &c., of a plea that they render to the plaintiffs the sum of $314.10 which the defendants owe to and unjustly detain from the plaintiffs.

For that heretofore, to wit, on the 1st day of March A. D. 1884, the said defendants, namely, the said Augustus S. Witten, as principal, and the said William M. Peery & Augustus S. Peery, as sureties, by their certain writing obligatory sealed with their seals and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the just and full sum of $314.10 and for the payment thereof they bound themselves, their heirs, executors, and administrators, jointly and severally firmly by their writing obligatory aforesaid, to which writing obligatory there was and is annexed a certain condition the effect and purport following, to wit: That

3 of the above bounden principal, or either of them, or the heirs, executors, or administrators of either of them, shall well and truly pay or cause to be paid unto the collector of internal revenue for the 4th collection district of Virginia the amount of taxes due and owing on the following described distilled spirits to wit:

Date.	No. barrels.	Wine gallons.	Proof gallons.	Taxable gallons.	Serial numbers of packages.
February 1	1	4450	4450	4500	20 to 2
7	1	4400	4312	4400	21 "
12	1	3850	4773	3900	22 "
16	1	4500	4500	4500	23 "
23	1	4700	4700	4700	24 "
25	1	4650	4603	4700	25 "
29	1	4200	4200	4200	26 "
29	1	3550	3550	3600	27 "
Totals	.....	34300	34088	34500	.....

which were deposited during the month ended February 29th, 1884, and entered for deposit in the distillery warehouse No. 3, of A. S. Witten, at Plumb Creek, in the 4th collection district of Virginia, on the first day of March, A. D. 1884, before such spirits shall be removed from such warehouse. and within three years from the date of said entry, then this obligation shall be void, otherwise to remain in full force and virtue.

4 And the said plaintiffs aver that the said Augustus S. Witten did not observe and fulfill and perform the said condition of the said writing obligatory, but therein wholly failed and made default; and for assigning more particularly a breach of the said writing obligatory, the said plaintiffs say, that after the making, acknowledging, & delivering of said writing obligatory, to wit, on the 1st day of March, 1884, the said Augustus S. Witten did have on deposit in his said distillery warehouse 39 galls. of distilled spirits in one barrel, serial number of which was 22, which was deposited during the month ended March 1st, 1884, to wit, February 12, 1884, and that since said distilled spirits were deposited in said distillery warehouse more than three years have elapsed, & that the said A. S. Witten failed to pay or caused to be paid the taxes due and owing on the same unto the collector of internal revenue for the 4th collection district of Virginia within three years from the date of said entry according to the tenor and effect of said writing obligatory.

And the said plaintiffs for assigning a further breach of said writing obligatory say, that after making and delivering the said writing

5 obligatory the said Augustus S. Witten removed or permitted to be removed from his said distillery warehouse distilled spirits, to wit, 39 gals., which were deposited in said distillery warehouse during the month ended March 1st, 1884, to wit, the 12 day of February, 1884, in one barrel, without paying or causing to be paid the taxes due and owing thereon unto the collector of internal revenue for the 4th collection district of Virginia according to the tenor and effect of said writing obligatory, and thereby became liable to the United States for $37.55 for taxes due and owing to said plaintiffs (which said sum of money has long since been due and payable) as follows:

To stamp tax on package #22—39 gals. Bourbon whiskey entered for deposit in said warehouse, March 1, '84, and reported on Nov., 1886, list, @ 90 cts..	$35.10
5 % penalty	1.75
Int. (2 mos.) to Jan'y 1st, '87	.70
	37.55

And the said plaintiffs say that no part of the said sum of $37.55 by the said Augustus S. Witten has been paid to the said plaintiffs, and that so the condition of the said writing obligatory has been broken, and that by reason of the said breach the said writing obligatory became and

6 was forfeited, whereby an action has accrued to the said plaintiffs to have and demand of the said defendants the sum of $314.10 first above demanded. Yet the said defendants, although often requested, have not nor has anyone of them as yet paid to the said plaintiffs the said sum of $314.10, first above demanded, or any part thereof, but to pay the same they have and each of them hath, wholly failed and still do fail & refuse so to do, to the damage of the said plaintiffs $314.10, and therefore the said plaintiffs bring their suit.

F. B. HUTTON,
Asst. U. S. Atty., W. Dist. of Va.

(Endorsements:) No. 136. The U. S. of America vs. Augustus S. Witten, Augustus S. Peery & Wm. M. Peery. Debt on warehouse bond. Declaration 1887, July R. Decl'n filed and demurrer thereto & set for hearing. Filed 11 June, 1887. Ed. T. Jones, dep. cl'k.

Bond.

The writing obligatory referred to in the foregoing declaration, together with the endorsements thereon, is in the words and figures following, to wit:

7 Know all men by these presents:

That we, Augustus S. Witten, of Jeffersonville, Tazewell Co., as principal, and William M. Peery, of Jeffersonville, Tazewell Co., & Augustus S. Peery, of Jeffersonville, Tazewell Co., as sureties, are held and firmly bound unto the United States of America, in the full and just sum of three hundred & fourteen $\frac{10}{100}$ dollars, lawful money of the United States, to which payment, well and truly to be made, we bind ourselves, jointly and severally, our several heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this first day of March, A. D. 1884.

The condition of the foregoing obligation is such, that if the above bounden principals, or either of them, or the heirs, executors, or administrators of either of them, shall well and truly pay, or cause to be paid, unto the collector of internal revenue for the 4th collection district of Virginia, the amount of taxes due and owing on the following described distilled spirits, to wit:

8 Date.	No. barrels.	Wine gallons.	Proof gallons.	Taxable gallons.	Serial numbers of packages (R 9771608 to 15).
February 1	1	44.50	44.50	45.00	20 to 2
7	1	44.00	43.12	44.00	21 "
12	1	38.50	37.73	39.00	22 "
16	1	45.00	45.00	45.00	23 "
23	1	47.00	47.00	47.00	24 "
25	1	46.50	46.03	47.00	25 "
29	1	42.00	42.00	42.00	26 "
29	1	35.50	35.50	36.00	27 "
Total		343.00	340.88	345 00	

which were deposited during the month ended February 29th, 1884, and entered for deposit in the distillery warehouse, No. 3, of A. S. Witten, at Plumb Creek, in the 4th collection district of Virginia, on the first day of March, A. D. 1884, before such spirits shall be removed from such warehouse, and within three years from the date of such entry, then this obligation shall be void; otherwise to remain in full force and virtue.

AUGUSTUS S. WITTEN [SEAL.]
WILLIAM M. PEERY [SEAL.]
AUGUSTUS S. PEERY [SEAL.]

Signed, sealed, and delivered in presence of—
A. T. STARRITT,
P. H. MCCAULL.

STATE OF VIRGINIA,
County of Tazewell, ss:

I hereby certify that on this first day of March, one thousand eight hundred and eighty-four, before me personally came Augustus S. Witten, William M. Peery, and Augustus S. Peery, known to me to be the individuals described in and who executed the above bond, and severally acknowledged that they executed the same.

[SEAL.] P. H. MCCAULL,
Depy. Collector.

The foregoing bond is approved by me, the same being executed in due form, and the sureties thereon being satisfactory to me.

I certify that the spirits produced during the month, and not covered by this bond, have been lawfully withdrawn —— being ——— taxable gallons.

[SEAL.] J. B. RAULSTON,
Collector.

(Endorsements:) Distiller's warehousing bond of A. S. Witten for the month of February, 1884. Distillery warehouse, No. 3. 4th dist. Virginia. Filed June 11, 1887. Ed. T. Jones, dep. clk.

10 And at another day, to wit:

At an adjourned term of the circuit court of the United States, continued and held for the western district of Virginia, in the fourth circuit, at Abingdon, on Monday, the 18th day of July, A. D. 1887.

No. 136. UNITED STATES, PLAINTIFFS,
vs.
AUGUSTUS S. WITTEN, AUGUSTUS S. Peery, and William M. Peery, defendants. } Debt on warehouse bond.

This day came the parties, by their attorneys, and thereupon the matters of law arising upon the defendants' demurrer to the plaintiff's declaration, entered at Rules, being argued, the court overruled the same, and thereupon the defendants say they have well and truly observed and performed the condition of the writing obligatory in the declaration mentioned and that they have not broken their covenant, in manner and form as the plaintiff against them hath complained; and thereupon came a jury, to wit, William Davis, William Jenkins, S. C. Abbott, J. P. Webb, O. W. Powers, Geo. W. Weaver, James Mullins, McCoy Halsey, Swan

11 Hamblin, James Fields, S. I. Duff, and Mat. Page, who, being duly elected, tried, and sworn, and, having heard the testimony and the arguments of counsel, retired to their room, and afterwards returned into court, having agreed upon the following verdict: "We, the jury, find for the defendants.—James Fields."

And thereupon the plaintiff moved the court to set aside the verdict in this cause, as contrary to the law and the evidence; which motion, after consideration, was overruled.

Therefore it is considered by the court that the plaintiff take nothing by his bill, but for his false clamor be in mercy, &c., and that the said defendants go thereof without day.

Memorandum.—On the trial of this cause the plaintiff, by her attorney, excepted to certain opinions of the court given upon said trial, and tendered his 3 bills of exceptions, numbered respectively 1, 2, and 3, which were received, signed, and sealed by the court, and ordered to be made a part of the record in this cause.

Exceptions.

12 The three bills of exceptions referred to in the foregoing court order are numbered respectively 1, 2, and 3, and are in the words and figures following, to wit:

Bill of exceptions No. 1.

THE UNITED STATES OF AMERICA *vs.* A. S. WITTEN, WM. M. PEERY, and Augustus S. Peery. } In debt on distillers' warehousing bond.

Be it remembered that in the trial of this cause the defendants, to sustain the issue on their part, introduced one Sam'l C. Leece as a witness, who went on to state that some time in March or April, 1885, or perhaps in the summer of that year, he wrote to the collector of the 4th internal-revenue district of Virginia, at the instance of A. S. Witten, one of the defendants, about the lock on the distillery warehouse of said A. S. Witten, telling him that the same was insecure and that said warehouse had been broken into; that the staple was either broken or prized off; that the witness sent up a padlock from his house to said Witten, with which to lock the warehouse, and that liquor was stolen from said warehouse during the time the Government lock was broken and the warehouse door was fastened with padlock. To the introduction of this evi-
13 dence the district attorney objected upon the ground that the same was not competent, and irrelevant because the defendants were not entitled to be relieved from payment of tax on packages deposited in the warehouse on account of the same having been broken open and liquor stolen therefrom, as claimed by them. But the court overruled the objection and permitted the witness to testify as aforesaid. And to this opinion of the court overruling the said objection the plaintiff *the plaintiff*, by said district attorney, excepts and prays that this first bill of exceptions may be signed, sealed, and made part of the record, which is done accordingly.

JOHN PAUL, [SEAL.]
Dist. Judge.

Bill of exceptions No. 2.

THE UNITED STATES OF AMERICA *vs.* A. S. WITTEN, WM. M. PEERY, and Augustus S. Peery. } In debt on distillers' warehousing bond.

Be it remembered that on the trial of this cause, after the plaintiffs had proved that the package referred to and set out in the declaration had
14 been deposited in the warehouse of the said A. S. Witten, which was bonded as averred in said declaration, and that the taxes on

said package had not been paid but were due and payable, the defendants to sustain the issue on their part introduced A. S. Witten, one of the defendants and the principal in said bond, as a witness, who went on to state that Government lock was first placed on warehouse and sealed in summer of 1885; that said Lard, a Government storekeeper, first put it on; that one McLevy, general storekeeper, came to take out a barrel shortly afterwards on his, witness', application according to law; that when said McLevy tried to lock door after barrel removed lock would not work. That McLevy then knocked lock together with a hammer; that he then sealed it and went away; that warehouse was open next morning, spring of lock broken, liquor had been stolen; that he Witten sent for Mr. Sam'l C. Leece, who was a commissioner of the U. S. circuit court. That Leece came and wrote to the collector of the 4th collection district
15 for him and at his instance, telling said collector about the unsafe condition of warehouse; that Leece sent or brought with him a common padlock and locked door of warehouse, and took key home with him; that he reported these facts to the then Collector Ralston of 4th district.

That in about a week McLevy, storekeeper, came, who put padlock on door again and took key off with him.

That some weeks after that he applied to take another barrel out of warehouse, that McLevy came, again opened door, took out barrel, locked door again with padlock and carried key off with him.

A short time afterwards padlock was picked and door opened. That he then sent for two men, neighbors of his, who came and fastened the door with another padlock. Some weeks afterwards he applied to have another package taken out of warehouse. McLevy came again, took out barrel; then McLevy fastened door with both padlocks, and took both keys with him. Shortly afterwards Revenue Officer Browning came and brought with him a little spring Government lock with which he fastened the door, and then McLevy in a few days came and fastened it with
16 a regular Government lock.

Not many days thereafter the staple by which door fastened was bored out of the facing of the door, staple clinched on inside; it was bored around with two-inch auger and removed and door opened. That he reported this to collector of the 4th district, and that shortly afterwards he informed said collector by letter that he would not be responsible for the whiskey any longer; to come and get it and make his tax out of it. The collector did not come, and he never heard any more about it, but the warehouse was broken into twice after that; that first lock was broken early in the summer 1885 and the breaking above referred to continued for some six months; that he couldn't fix exact dates, but that during these six months there was stolen from said warehouse three barrels and three half barrels of whiskey.

That he does not know whether particular packages set out in declaration were stolen, but that liquor amounting to the contents of three barrels and three half barrels was stolen; that he selected the warehouse according to law, that afterwards the warehouse in his opinion became unsafe
17 building in which to store liquor; and that he so notified the collector of the 4th district by letter written by Mr. Sam'l C. Leece.

To the introduction of all this evidence the district attorney objected upon the ground that it was not competent and was irrelevant, because the defendants were not entitled to be relieved from payment on packages deposited in the warehouse on account of the same having been broken open and liquor stolen therefrom, as claimed by them. But the court overruled the objection and permitted the witness to testify as aforesaid. And to this opinion of the court overruling the said objection the plaintiff by said district attorney excepts and prays this his second bill of exceptions may be signed, sealed, and made part of the record, which is done accordingly.

JOHN PAUL, [SEAL.]
Dist. Judge.

Bill of exceptions No. 3.

THE UNITED STATES OF AMERICA *vs.* A. S. WITTEN, WM. M. PEERY, AND Augustus S. Peery. } In debt on distillers' warehousing bond.

18 Be it remembered that after the jury were sworn to try the issue joined in this cause the plaintiff, to maintain the said issue on her part, gave in evidence to the jury the books of the 4th collection district showing that the package of whiskey on which tax had not been paid as averred in the declaration, had been deposited in the defendant A. S. Witten's warehouse, and that said tax was not paid and due, and after said A. S. Witten admitted in open court that said package had been deposited as averred and that he had not paid said tax, and whereupon the defendants to maintain the said issue on their part gave in evidence that the Government lock and seal was *was* first placed on said warehouse in summer of 1885; that a Government storekeeper put it on; that afterwards the general storekeeper came to take out a barrel on the application of A. S. Witten, the distiller, according to law; that when said Government storekeeper tried to lock the door after barrel taken out, lock would not work; that said storekeeper then knocked the lock together with a hammer, sealed it and went away; that warehouse was open next
19 morning, spring of lock broken, and liquor had been stolen. That said A. S. Witten sent for Mr. Samuel C. Leece who was a commissioner of the U. S. circuit court; that Leece came and wrote to Colo. Ralston then collector 4th dist. of Virginia, for said A. S. Witten and at his instance, telling said collector about the lock and unsafe condition of the warehouse; that said Leece brought with him or sent afterwards a common padlock with which door of warehouse was locked & Leece took key home with him; that about a week afterwards one McLevy, general storekeeper, came to said warehouse, locked door with same padlock and carried key away with him; that some weeks thereafter said Witten applied to remove another barrel; that said McLevy came again, barrel was taken out, and McLevy again locked door with same padlock and carried key off; that shortly afterwards padlock was picked and door of warehouse opened; that said Witten then sent for two neighbors who came and fastened door of warehouse with another padlock; that some weeks

afterwards said Witten applied to remove another package from
20 warehouse; that McLevy came again, that barrel was taken out, and McLevy fastened the door of warehouse with both of said padlocks & took both keys away with him; that shortly afterwards revenue officer Browning came and brought a little spring Government lock with which he fastened door of the warehouse; that said McLevy came a few days thereafter and fastened said door with a regular Government lock; that not many days thereafter the staple by which door fastened was bored out of tne facing of door; that said staple was clinched on inside, that it was bored around with a two-inch auger and removed and door opened; that said A. S. Witten reported these things to the collector of the 4th district; that shortly thereafter said A. S. Witten informed said collector by letter that he would not be responsible for the whiskey in the warehouse any longer; that said collector must come and get it and make his tax out of it; that said collector did not come, and that said A. S. Witten never heard anything more about it; that said warehouse was broken into twice after that; that the first padlock was broken early in the summer of 1885, and that the breaking above referred to
21 continued during some six months; that the said A. S. Witten could not fix the exact dates of the several breakings as aforesaid; that during these six months there was stolen from said warehouse three barrels and three half barrels of whiskey; that said Witten did not know whether the particular package set out in the declaration as package on which tax had not been paid was stolen, but that whiskey amounting fully to the contents of three barrels and three half barrels was stolen during the time of said breakings; that said A. S. Witten had selected and designated the warehouse according to law and it was approved by the Commissioner of Internal Revenue; that afterwards, in the opinion of said A. S. Witten, said warehouse was not a safe building in which to store whiskey & that he so notified the collector of the 4th district by letter, by Mr. Sam'l C. Leece, as aforesaid, & *and* these were all the facts proved.

Whereupon the district attorney moved the court to instruct the jury as follows, that is to say:

If the jury believe from the evidence that the defendant, A. S.
22 Witten, is indebted to the United States in the sum of $37.55 for tax on 39 gallons Bourbon whiskey entered for deposit in distillery warehouse on February 12, 1884, and that said tax was never paid as set forth in the declaration, they must find for the plaintiff, the debt in the declaration mentioned to be discharged by the payment of said sum with penalty added thereto, notwithstanding they may further believe from the evidence that at times there were locks placed on the door of said warehouse by the revenue officers having the same in charge, such as are not provided for by law, and that at other times the Government locks placed by the revenue officers on the door of said warehouse were insufficient and insecure, and that said warehouse itself was not a secure building, and that during said times said warehouse was broken open and the said whiskey stolen from the same.

But the court refused to give the said instructions to the jury, but instructed the jury as follows, that is say:

23 The jury are instructed that in this case the plaintiff, having proved the demand made in the declaration, to wit, the sum of

$37.55, is entitled to recover that amount from the defendants as taxes due from the defendant, A. S. Witten, to the Government, and they should find a verdict for that amount, unless the jury shall believe from the evidence that through the negligence and default of the officers of the Government the defendant lost a portion of the whiskey deposited in the bonded warehouse; then as to the number of gallons so lost by the default or negligence of the agents of the Government the defendants are entitled to a reduction of the Government's demand at the rate of ninety cents on the gallon.

To which opinion of the court, refusing said instructions as asked for, and giving the instructions as above set forth, the plaintiff, by said district attorney, excepts and tenders this his 3rd bill of exceptions, and which he prays may be signed, sealed, and made a part of the record in this cause, and the same is done accordingly.

JOHN PAUL, [SEAL.]
Dist. Judge.

23¼ (Indorsed:) No. 136. The United States vs. Augustus S. Witten, Augustus S. Peery, and William M. Peery. Suit on warehousing bond. Copy of record. Abingdon, W. D. Va. U. S. circuit court.

(Stamp:) Office Int. Rev. Received Sep. 9, 1887. Law div., sec. 1.

(For remainder of record see page 24.—I. C. Fowler, clerk.)

23½ DEPARTMENT OF JUSTICE,
Washington, November 18, 1887.

HENRY C. ALLEN, Esq.,
U. S. Attorney, Woodstock, Va.:

SIR: I send you a copy of the record and proceedings in the case of the United States vs. Augustus S. Witten, Augustus S. Peery, and William M. Peery, No. 136, circuit court of the United States for the western district of Virginia. Sue out a writ of error in this case.

Very respectfully,

A. H. GARLAND,
Attorney-General.

24 And at another day, to wit:

At an adjourned term of the circuit court of the United States, continued and held for the western district of Virginia in the fourth circuit, at Abingdon, on Wednesday the 8th day of February, A. D. 1888.

Present, Hon. John Paul, judge.

In the case of The United States, pltf., vs. Augustus S. Witten, Augustus S. Peery, and William M. Peery, defts. Action of debt on a warehousing bond.

On motion of the district attorney a writ of error to the Supreme Court of the United States is allowed. And the clerk of this court is directed to issue said writ of error and prepare the citation as required by law.

And on the same day, to wit, on the 8th day of February, A. D. 1888, the clerk of this court, in obedience to the foregoing order, issued the writ of error, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judge of the circuit court of the United States for the western district of Virginia, greeting:

25 Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between the United States and Augustus S. Witten, Augustus S. Peery, and William M. Peery, a manifest error hath happened to the great damage of the said plaintiffs, as by complaint appears. He being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you: if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable Morison R. Waite, Chief Justice of the
26 Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

I. C. FOWLER,
Clerk of the Circuit Court of the United States for the Western District of Virginia.

[Seal of the circuit court of U. S.]

Memorandum: The foregoing writ of error was executed and by the marshal returned to the Supreme Court of the U. S. at Washington.

And at the same day, to wit, on the 8th day of February, A. D. 1888, the clerk issued a citation, which is in the words and figures following, to wit:

The United States of America to Augustus S. Witten, Augustus S. Peery, and William M. Peery, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western
27 district of Virginia, at Abingdon, wherein the United States are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morison R. Waite, Chief Justice of the Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN PAUL,
U. S. District Judge, West. Dist. of Va.

A copy. Teste:

I. C. FOWLER,
Clerk U. S. Circuit Court, at Abingdon.

[Seal of C. Ct. U. S.]

Memorandum: The foregoing citation was also executed and was likewise returned by the marshal to the U. S. Supreme Court at Washington.

28 I, I. C. Fowler, clerk of the circuit court of the United States for the western district of Virginia, at Abingdon, in the fourth circuit, do certify that the foregoing is a true and correct copy of the record and proceedings of said court in the case of the United States vs. Augustus S. Witten, Augustus S. Peery, and William M. Peery, No. 136, in debt on warehousing bond.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 14th day of September, A. D. 1888.

[SEAL.] I. C. FOWLER,
Clerk of the U. S. Circuit Court at Abingdon, W. D. Va.

Clerk's fee:

Copy of record, 54 folios, at 15 c.	$8.10
Seal & certificate	.35
	$8.45

(Indorsement on cover:) No. 152. The United States, plaintiff in error, vs. Augustus S. Witten, Augustus S. Peery, and William M. Peery. W. Virginia C. C. U. S. Filed October 4, 1888.

Office Supreme Court U. S.
FILED.
JAN 2 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
AUGUSTUS S. WITTEN, WILLIAM M. PEERY, and James R. Witten. } No. 151.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
AUGUSTUS S. WITTEN, AUGUSTUS S. PEERY, and William M. Peery. } No. 152.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
AUGUSTUS S. WITTEN, WILLIAM M. PEERY, and James R. Witten. } No. 151.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
AUGUSTUS S. WITTEN, AUGUSTUS S. PEERY, and William M. Peery. } No. 152.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are two suits brought upon a warehouse bond given by a distiller, conditioned that the distiller and his sureties should well and truly pay, or cause to be paid,

unto the collector of internal revenue for the fourth collection district of the State of Virginia the amount of taxes due and owing on certain described distilled spirits deposited in his distillery warehouse. The breach alleged was a failure in one case to pay the tax on 39 gallons deposited in the warehouse, and in the other case to pay the tax on 93 gallons deposited in the same warehouse. In both cases the breach was admitted, but the distiller sought to avoid the effect of the breach by introducing evidence to show that the whisky had been stolen from the warehouse, and that the stealing had been made possible by the negligence of the revenue officers of the United States in not keeping a proper lock upon the distillery warehouse. The question in both cases is sufficiently presented by bill of exceptions No. 3, to be found on page 7 of the record of case No. 152, as follows:

Bill of exceptions No. 3.

THE UNITED STATES OF AMERICA *vs.* A. S. WITTEN, WM. M. PEERY, AND Augustus S. Peery.	In debt on distillers' warehousing bond.

Be it remembered that after the jury were sworn to try the issue joined in this cause the plaintiff, to maintain the said issue on her part, gave in evidence to the jury the books of the fourth collection district showing that the package of whisky on which tax had not been paid, as averred in the declaration, had been deposited in the defendant A. S. Witten's warehouse, and that said tax was not paid and due, and after said A. S. Witten admitted in open court that said package had been deposited as averred and that

he had not paid said tax, and whereupon the defendants, to maintain the said issue on their part, gave in evidence that the Government lock and seal *was* first placed on said warehouse in summer of 1885; that a Government storekeeper put it on; that afterwards the general storekeeper came to take out a barrel on the application of A. S. Witten, the distiller, according to law; that when said Government storekeeper tried to lock the door after barrel taken out, lock would not work; that said storekeeper then knocked the lock together with a hammer, sealed it and went away; that warehouse was open next morning, spring of lock broken, and liquor had been stolen. That said A. S. Witten sent for Mr. Samuel C. Leece, who was a commissioner of the United States circuit court; that Leece came and and wrote to Col. Ralston, then collector fourth district of Virginia, for said A. S. Witten and at his instance, telling said collector about the lock and unsafe condition of the warehouse; that said Leece brought with him or sent afterwards a common padlock with which door of warehouse was locked and Leece took key home with him; that about a week afterwards one McLevy, general storekeeper, came to said warehouse, locked door with same padlock, and carried key away with him; that some weeks thereafter said Witten applied to remove another barrel; that said McLevy came again, barrel was taken out, and McLevy again locked door with same padlock and carried key off; that shortly afterwards padlock was picked and door of warehouse opened; that said Witten then sent for two neighbors who came and fastened door of warehouse with another padlock; that some weeks afterwards said Witten applied to remove another package from warehouse; that McLevy came again, that barrel was taken out, and McLevy fastened the door of warehouse with both of

said padlocks and took both keys away with him; that shortly afterwards revenue officer Browning came and brought a little spring Government lock with which he fastened door of the warehouse; that said McLevy came a few days thereafter and fastened said door with a regular Government lock; that not many days thereafter the staple by which door fastened was bored out of the facing of door; that said staple was clinched on inside; that it was bored around with a 2-inch auger and removed and door opened; that said A. S. Witten reported these things to the collector of the fourth district; that shortly thereafter said A. S. Witten informed said collector by letter that he would not be responsible for the whisky in the warehouse any longer; that said collector must come and get it and make his tax out of it; that said collector did not come, and that said A. S. Witten never heard anything more about it; that said warehouse was broken into twice after that; that the first padlock was broken early in the summer of 1885, and that the breaking above referred to continued during some six months; that the said A. S. Witten could not fix the exact dates of the several breakings as aforesaid; that during these six months there was stolen from said warehouse three barrels and three half barrels of whisky; that said Witten did not know whether the particular package set out in the declaration as package on which tax had not been paid was stolen, but that whisky amounting fully to the contents of three barrels and three half barrels was stolen during the time of said breakings; that said A. S. Witten had selected and designated the warehouse according to law, and it was approved by the Commissioner of Internal Revenue; that afterwards, in the opinion of said A. S. Witten, said warehouse was not a fit building in which to store whisky.

and that he so notified the collector of the fourth district by letter, by Mr. Sam'l C. Leece, as aforesaid, and these were all the facts proved.

Whereupon the district attorney moved the court to instruct the jury as follows, that is to say:

If the jury believe from the evidence that the defendant, A. S. Witten, is indebted to the United States in the sum of $37.55 for tax on 39 gallons Bourbon whisky entered for deposit in distillery warehouse on February 12, 1884, and that said tax was never paid as set forth in the declaration, they must find for the plaintiff, the debt in the declaration mentioned to be discharged by the payment of said sum with penalty added thereto, notwithstanding they may further believe from the evidence that at times there were locks placed on the door of said warehouse by the revenue officers having the same in charge, such as are not provided for by law, and that at other times the Government locks placed by the revenue officers on the door of said warehouse were insufficient and insecure, and that said warehouse itself was not a secure building, and that during said times said warehouse was broken open and the said whisky stolen from the same.

But the court refused to give the said instructions to the jury, but instructed the jury as follows, that is to say:

The jury are instructed that in this case the plaintiff, having proved the demand made in the declaration, to wit, the sum of $37.55, is entitled to recover that amount from the defendants as taxes due from the defendant, A. S. Witten, to the Government, and they should find a verdict for that amount, unless the jury shall believe from the evidence that through the negligence and default of the officers of the Government the defendant lost a portion of the whisky deposited in the bonded warehouse; then as

to the number of gallons so lost by the default or negligence of the agents of the Government the defendants are entitled to a reduction of the Government's demand at the rate of 90 cents on the gallon.

To which opinion of the court, refusing said instructions as asked for, and giving the instructions as above set forth, the plaintiff, by said district attorney, excepts and tenders this his third bill of exceptions, and which he prays may be signed, sealed, and made a part of the record in this cause, and the same is done accordingly.

[SEAL.] JOHN PAUL,
District Judge.

ASSIGNMENT OF ERROR.

The court erred in refusing to give to the jury the instruction requested by the district attorney, and in giving the instruction set forth above.

ARGUMENT.

The question in this case is whether a principal and his sureties are relieved from the obligation of their bond to pay the tax on distilled spirits when those distilled spirits are stolen from the warehouse, and such stealing is made possible by defective locks placed thereon by Government officers.

We do not think that there can be any doubt as to the correct answer to this question. The Government gives to the distiller the privilege, if he sees fit, of not paying the tax on whisky when distilled if he is willing to deposit it in a warehouse prepared by him and offered by him to the Government as a place of deposit.

Section 3271 provides that every distiller shall provide at his own expense a warehouse, to be situate upon and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall be paid, and that such warehouse, when approved by the Commissioner of Internal Revenue, on the report of the collector, shall be a bonded warehouse of the United States, and shall be under the direction and control of the collector of the district, and in charge of the internal revenue storekeeper.

Section 3272 provides, that whenever in the opinion of the Commissioner of Internal Revenue any distillery warehouse is unsafe or unfit for use, he may discontinue such warehouse, and require the merchandise therein to be transferred to such other warehouse as he may designate, within such time as he may prescribe.

Section 3274 provides that every distillery warehouse *shall be in the joint custody of the storekeeper and the proprietor thereof;* that it shall be kept securely locked, and shall only be opened in the presence of the storekeeper.

Section 3275 provides that no fence or wall of a height greater than 5 feet shall be erected around the premises of any distillery, and every distiller shall furnish to the collector of the district as many keys of the gates and doors of the distillery as may be required by the collector from time to time for any revenue officer who may be authorized to make survey or inspection of the premises or of the contents thereof, and said distillery shall be kept always accessible to any officer or other person having any such key.

The bond in this case was given under section 3293 of the Revised Statutes, as amended by the joint resolution of March 28, 1878, and by section 5 of the act of March 1, 1879, which provides for deposit in the distillery warehouse of distilled spirits, and requires that the said distiller or owner shall at the time of making said entry give his bond in duplicate, with one or more sureties satisfactory to the collector of the district, conditioned that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid before removal from said distillery warehouse, and within one year from the date of said entry. The joint resolution of March 28, 1878, increased the one year to three years. The whole system may be found by reference to pages 23, 24, and 25 of series 7, No. 7, Supplement No. 2 revised, of the Regulations of the Commissioner of Internal Revenue.

It is manifest that the requirement for the deposit of spirits in a warehouse, and the giving of bond for the same, is a privilege extended to the distiller by which he may delay the payment of the tax, and that the restrictions imposed upon this privilege are for the benefit and protection not of the distiller but of the Government. The control of the distiller over the warehouse, and that of the Government, are joint. The distiller may surround his warehouse with any protection from theft or loss of spirits by other cause, provided only that he give to the Government officers the means of access to the warehouse.

The fact that Government officers neglect their duty with reference to locks and keys required by law for the

benefit and protection of the Government, is a failure to perform a duty to the Government and not to the distiller. With respect to the distiller and his sureties, therefore, it is not negligence at all. His contract is to pay the tax. If he feared theft, it was his business to protect his property so that loss could not occur, or to pay the tax and take complete possession of the whisky. He did neither, and it does not now lie with him to avoid the performance of his contract by a plea that the Government officers did not perform their duty to the Government. The principle has been so often announced by this court as hardly to require citation. It is laid down in *Minturn* vs. *United States* (106 U. S., 437); *Hart* vs. *United States* (95 U. S., 316); *United States* vs. *Kirkpatrick* (9 Wheat., 720); *United States* vs. *Vanzandt* (11 Wheat., 184); *United States* vs. *Nicholl* (12 Wheat., 505); *Gibbons* vs. *United States* (8 Wall., 269); and *Jones* vs. *United States* (18 Wall., 662).

Hart vs. *United States* (*supra*) was a suit brought by the United States against the principal and sureties on a distiller's bond, to recover taxes on spirits distilled by the principal, and the sureties pleaded that the taxes were a lien on the spirits, and that the collector without the knowledge or assent of the sureties, and without first requiring the payment of the taxes thereon, permitted the principal to remove from the distillery distilled spirits more than sufficient in value to pay the demand. This court held that as, under the statute, no distilled spirits could be removed from the warehouse without payment of the tax, and no officer of the United States had author-

ity to dispense with the requirement of the law, the United States were not bound by the acts of the collector. If the rights of the United States under the distiller's bond were not affected by the acts of the collector where he went so far as to grant express permission to remove spirits from the warehouse without paying the tax, *a fortiori* is the Government not affected by the removal of spirits from the warehouse without paying the tax when it occurs only through negligence of its officers. The other above cases were cited in *Hart* vs. *The United States* to show that the Government was not responsible for the laches or other acts of its officers, and it was there said by the Chief-Justice, who delivered the opinion of the court:

> Here the surety was relying on the lien which the law gave as security for the payment of the taxes. He also knew that in order to retain this lien the Government must rely upon the diligence and honesty of its agents. If they perform their duties and preserve the security, it inured to his benefit as well as that of the Government; but if by neglect or misconduct they lose it, the Government did not come under obligations to make good the loss to him, or, what is the same thing, release him *pro tanto* from the obligation of his bond. As between himself and the Government he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed.

If this is the law with reference to sureties, *a fortiori*, can the principal not rely upon the negligence of the Government officers to relieve him from the letter and obligation of his bond.

It is respectfully submitted that the judgments for the defendants in the two cases should be reversed and a new trial ordered.

WM. H. TAFT,
Solicitor-General.